Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	WC Docket No. 07-245
	)	
Implementation of Section 224 of the Act;	)	GN Docket No. 09-51
A National Broadband Plan for Our Future	)	
	)	
	)	
	)	

REPLY TO OPPOSITION TO THE FLORIDA IOUS' PETITION FOR RECONSIDERATION:

Florida Power & Light Co.
Tampa Electric Co.
Progress Energy Florida, Inc.
Gulf Power Co.
Florida Public Utilities Co.

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November 11, 2010

Pursuant to 47 C.F.R. § 1.429(g), Florida Power & Light Company, Tampa Electric Company, Progress Energy Florida, Inc., Gulf Power Company, and Florida Public Utilities Company (collectively, the "Florida IOUs") respectfully submit this reply to the opposition to the Florida IOUs' Petition for Reconsideration and Request for Clarification[1] of Order No. FCC 10-84 ("Order").[2] Specifically, this reply addresses the oppositions and comments filed by Time Warner Cable, Inc., tw telecom, inc., and CTIA.[3]

I. The Florida IOU Petition

The Florida IOU Petition principally requested clarification (1) that common electric distribution construction configurations in the electric supply space will not trigger an attacher's right to use techniques such as boxing and bracketing in the communications space, and (2) that the Commission's new definition of "insufficient capacity" does not require rearrangement of electric facilities in the supply space. In opposition, various attaching entities argued (1) that the Commission should dictate electric distribution construction standards (such as the required separation between conductors and transformers), (2) that *Southern Company* and the Commission Orders it reversed do not support the Florida IOUs' request, and (3) that the practical distinction between electric and communications facilities drawn by the Florida IOUs is

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[1] Petition for Reconsideration and Request for Clarification of the Florida Investor-Owned Utilities, WC Docket No. 07-245 & GN Docket No. 09-51 (Sept. 2, 2010) ("Florida IOU Petition").

[2] Order and Further Notice of Proposed Rulemaking, FCC 10-84 (Released May 20, 2010) ("Order & FNPRM"). The FNPRM and Order were published separately. *See* 75 Fed. Reg. 41,338 (July 15, 2010), as corrected 75 Fed. Reg. 45,590 (Aug. 3, 2010); 75 Fed. Reg. 45,494 (Aug. 3, 2010). For ease of reference, these comments will provide citations to the paragraph numbers as they appear in the May 20, 2010 Order & FNPRM.

[3] Comments of Time Warner Cable Inc. Regarding Petitions for Reconsideration, WC Docket No. 07-245 & GN Docket No. 09-51 (Nov. 1, 2010) ("Time Warner Cable Opposition"); Opposition of tw telecom inc., WC Docket No. 07-245 & GN Docket No. 09-51 (Nov. 1, 2010) ("tw telecom Opposition"); Comments of CTIA—The Wireless Association®, WC Docket No. 07-245 & GN Docket No. 09-51 (Nov. 1, 2010) ("CTIA Opposition").

legally unfounded. The attaching entities arguments, if accepted, would put the Commission in the position of micromanaging electric distribution construction practices and would conflict with the holding in *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002).

II. The Commission Should Decline The Invitation To Micromanage Electric Distribution Construction Practices.

Aside from the threshold legal issue of whether the Commission *can* require rearrangement of electric distribution facilities, there is the very serious question of whether it *should*. Any such requirement would be the first step on a very slippery slope towards micromanaging electric distribution construction practices. Yet this is precisely the step certain attaching entities are indirectly asking the Commission to take.

By way of example, tw telecom argues that a utility choosing to "install a transformer 60 inches below an existing electrical conductor" should be obligated to rearrange its facilities to accommodate an attacher because the utility constructed its facilities with a 60-inch separation, rather than the 40-inch minimum separation required by the NESC.[4] In other words, tw telecom argues the Commission should require that utilities construct their electric facilities to NESC minimum standards, and nothing more. Similarly, tw telecom argues that "electrical lines from a pole to an end-user location may run at a high to low angle off of the pole to the customer location because of the relative heights of the pole and customer location or because there is substantial slack in the line which causes the line to sag" concluding that "the utilities must often move, set-off or eliminate slack in the line to allow for attachment in these circumstances."[5] In other words, tw telecom argues that the Commission ought to require the utility to run lines according to some standard practice (unclear what that might be) that allows for minimum slack

[4] tw telecom Opposition, at 9.

[5] *Id.*

in order to accommodate attachments. These propositions would put the Commission in the untenable position of *de facto* regulation of electric distribution construction practices, an area outside its jurisdiction, and respectfully beyond its expertise.

Attaching entities further claim that a utility's practices "*anywhere* on its pole" (including in its electric supply space) should trigger its obligation "to allow communications attachers to do the same."[6] These are nothing but poorly disguised attempts to have the Commission adopt a national engineering standard—which it has explicitly refused to do—and engage in the business of regulating electric distribution construction practices.

III. The Attaching Entities' Interpretation of *Southern Company* Ignores the Commission Orders Reversed by the Eleventh Circuit.

The Florida IOU Petition cited the *Southern Company* decision – which unarguably reversed the Commission's capacity expansion rule – in support of its request for clarification of the definition of insufficient capacity. Though Time Warner Cable accused the Florida IOUs of "blatantly misread[ing] *Southern Company* to advance their argument,"[7] the language in *Southern Company* not only supports the Florida IOUs' arguments but also expressly rejects the arguments advanced by attachers. For example, Time Warner Cable argues that the Eleventh Circuit did not "have occasion to analyze Section 224(f)(2) in the specific context of a utility that demonstrably replaces poles when necessary for its *own* operations."[8] This is demonstrably untrue for two reasons.

First, *Southern Company* itself held that what a utility does for itself in its own operations does not determine when it may deny access for insufficient capacity:

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[6] Time Warner Cable Opposition, at 10 (emphasis in original); *see also* CTIA Opposition, at 2-4.

[7] Time Warner Cable Opposition, at 13.

[8] *Id.* at 16 (emphasis in original).

> The FCC … suggests that the nondiscrimination principle that motivated the 1996 Telecommunications Act mandates that the FCC prohibit a utility from "favor[ing] itself over other parties with respect to the provision of telecommunications or video programming services." *First Report and Order*, 11 FCC Rcd. 15499, para. 1157 (Aug. 1, 1996). The rule on expansion of capacity, according to the FCC, is simply one manner in which the FCC implements Congress's intent to prevent utilities from exploiting their monopoly ownership of the necessary infrastructure to deny competitors access to their markets. The FCC merely mandates that utilities make room for third parties in the same manner in which they would if they needed additional space for their telecommunications operations.
>
> The FCC's position is contrary to the plain language of § 224(f)(2).[9]

It is hard to fathom a more explicit rejection of the argument Time Warner Cable now advances.

Second, *Southern Company* was a **reversal** of the Commission's capacity expansion rule. To understand the import of this reversal, it is important to understand *what* was reversed. Rather than repeating the arguments made by the Florida IOUs (and other electric utilities) in multiple prior submissions, the Florida IOUs attach hereto as Exhibit A and Exhibit B the applicable portions of the *Local Competition Order* and the *Local Competition Order on Rehearing* underlying the Eleventh Circuit's reversal of the Commission's capacity expansion rule. In an attempt to sidestep the rejection of these Orders, Time Warner Cable argues that these Orders do not clearly state that rearrangement constituted "capacity expansion" (and thus mandated rearrangement is not barred under *Southern Company*): "[a]t most, the *Local Competition Order* itself is ambiguous; it switches back and forth between terminology."[10] As the attached excerpts make clear, the Commission considered pole changeouts **and** rearrangements to be means of capacity expansion; any new capacity expansion requirement would be unlawful under *Southern Company*. In addition, the Commission's now-reversed

[9] *Southern Co.*, 293 F.3d at 1346. Time Warner Cable nonetheless states that *Southern Company* "said nothing whatsoever…about the circumstances in which an electric utility must do for attachers what it does for itself." Time Warner Cable Opposition, at 13-14.

[10] Time Warner Cable Opposition, at 7.

capacity expansion rule was premised on the very same principle attachers' now assert – that the utility must do for others whatever it does for itself.

IV. The Distinction Between Rearrangement of Facilities in the Communications Space and Rearrangement of Electric Facilities in the Supply Space is a Practical Distinction, Not a Legal Distinction.

The Florida IOU Petition asked the Commission to clarify, among other things, that "an electric utility is not obligated to … rearrange its electric facilities in order to accommodate an attachment request."[11] Time Warner Cable attacks the Florida IOUs' request to draw the line of required rearrangement at electric supply facilities as "only a half-measure" and notes that "[a]s for precedent, the Florida IOUs cite exactly none, because there is note to cite."[12] Time Warner Cable further argues that "the distinction between rearranging electrical and communications facilities makes no sense and has no basis in the Act," arguing that the Commission should reject the Florida IOU Petition based on this lack of legal distinction.[13]

Time Warner Cable is correct that there is no legal basis for distinguishing between make ready in the communications space and electric supply space – *neither* is required under section 224(f)(2) and *Southern Company*. But as the Florida IOUs repeatedly have stated, their chief concern with the Commission's rules is the impact on their ability to safely, reliably, and efficiently perform their central duty -- providing electric service to customers. The reason the Florida IOUs sought clarification of the definition of "insufficient capacity" in its limited potential application to electric supply space rearrangement is because, practically speaking, it is at that point that the Commission's pole attachment policy escalates to a meaningful operational problem.

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[11] Florida IOU Petition, at 15.

[12] Time Warner Cable Opposition, at 2, 5-6.

[13] *Id.* at 2-5.

To be clear, *Southern Company* already has answered the question of whether the Commission can require *any* form of capacity expansion (which includes rearrangement of *any* facilities on the pole).[14] But the Florida IOUs only sought clarification or reconsideration of the aspects of the Commission's rule that bear directly on core operational issues. Given Time Warner Cable's response to this practical delineation, perhaps the Florida IOUs should have sought a more aggressive clarification of the rule that would bring it entirely in-line with *Southern Company*.

V. Conclusion

The Florida IOUs respectfully request that the Commission clarify, or in the alternative reconsider, the Order as requested in the Florida IOU Petition.

Respectfully submitted,

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[14] Of course, utilities can and often do voluntarily agree to perform make-ready in the electric supply space, as the Time Warner Cable Opposition seems to understand. *See id.* at 6.

Exhibit A

Local Competition Order

FCC 96-325

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

FIRST REPORT AND ORDER

Adopted: August 1, 1996 Released: August 8, 1996

By the Commission: Chairman Hundt and Commissioners Quello, Ness, and Chong issuing separate statements.

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we reject the contention of some utilities that they are the primary arbiters of such concerns, or that their determinations should be presumed reasonable.[2835] We recognize that the public welfare depends upon safe and reliable provision of utility services, yet we also note that the 1996 Act reinforces the vital role of telecommunications and cable services. As noted above, section 224(f)(1) in particular reflects Congress' intention that utilities must be prepared to accommodate requests for attachments by telecommunications carriers and cable operators.

(3) Guidelines Governing Certain Issues

1159. In addition to the rules articulated above, we will establish guidelines concerning particular issues that have been raised in this proceeding. These guidelines are intended to provide general ground rules upon which we expect the parties to be able to implement pro-competitive attachment polices and procedures through arms-length negotiations, rather than having to rely on multiple adjudications by the Commission in response to complaints or by other forums. We do not discuss herein every issue raised in the comments. Rather, we discuss only major issues that we believe will arise often. Issues not discussed herein may be important in a particular case, but are not susceptible to any general observation or presumption.

1160. We note that a utility's obligation to permit access under section 224(f) does not depend upon the execution of a formal written attachment agreement with the party seeking access. We understand that such agreements are the norm and encourage their continued use, subject to the requirements of section 224. Complaint or arbitration procedures will, of course, be available when parties are unable to negotiate agreements.[2836]

(a) Capacity Expansions

1161. When a utility cannot accommodate a request for access because the facility in question has no available space, it often must modify the facility to increase its capacity.[2837] In some cases, a request for access can be accommodated by rearranging existing facilities to make room for a new attachment.[2838] Another method of maximizing useable capacity is to permit "overlashing," by which a new cable is

[2835] American Electric comments at 14, 21; NEES comments at 14; ConEd comments at 11; Delmarva reply at 8.

[2836] *See infra*, Section E.

[2837] Cole comments at 9; ConEd comments at 10; MFS comments at 10; NCTA reply at 5-6.

[2838] GST Telecom comments at 5.

wrapped around an existing wire, rather than being strung separately.[2839] A utility pole filled to capacity often can be replaced with a taller pole.[2840] New underground installations can be accommodated by the installation of new duct, including subducts that divide a standard duct into four separate, smaller ducts.[2841] Cable companies and others contend that there is rarely a lack of capacity given the availability of taller poles and additional conduits.[2842] These commenters suggest that utilities should rarely be permitted to deny access on the basis of a lack of capacity, particularly since under section 224(h) the party or parties seeking to increase capacity will be responsible for all associated costs.[2843] Utilities argue that neither the statute nor its legislative history requires facility owners to expand or alter their facilities to accommodate entities seeking to lease space.[2844] These commenters argue that, if Congress intended such a result, the statute would have imposed the requirement explicitly.[2845]

1162. A utility is able to take the steps necessary to expand capacity if its own needs require such expansion. The principle of nondiscrimination established by section 224(f)(1) requires that it do likewise for telecommunications carriers and cable operators.[2846] In addition, we note that section 224(f)(1) mandates access not only to physical utility facilities (*i.e.*, poles, ducts, and conduit), but also to the rights-of-way held by the utility. The lack of capacity on a particular facility does not necessarily mean there is no capacity in the underlying right-of-way that the utility controls. For these reasons, we agree with commenters who argue that a lack of capacity on a particular facility does not automatically entitle a utility to deny a request for access. Since the modification costs will be borne only by the parties directly benefitting from the modification,[2847] neither the utility nor its ratepayers will be harmed, despite the assertions of utilities to the contrary.[2848]

[2839] MFS comments at 10; GST Telecom comments at 5.

[2840] Cole comments at 14-15.

[2841] GST Telecom comments at 5; Cole comments at 17.

[2842] Cole comments at 15.

[2843] NCTA comments at 12; Summit comments at 1; MCI comments at 23.

[2844] American Electric reply at 19; ConEd reply at 5; U S West reply at 7; GTE reply at 26; Virginia Power reply at 5.

[2845] SBC reply at 21.

[2846] AT&T reply at 14-15; MFS reply at 22. We note that this standard differs from the one we adopt for collocation of equipment on incumbent LEC premises under section 251(c)(6). *See supra*, Section VI.

[2847] *See infra*, Section 2(b).

[2848] *See, e.g.*, Ohio Ed reply at 19.

1163. In some cases, however, increasing capacity involves more than rearranging existing attachments or installing a new pole or duct. For example, the record suggests that utility poles of 35 and 40 feet in height are relatively standard, but that taller poles may not always be readily available.[2849] The transportation, installation, and maintenance of taller poles can entail different and more costly practices.[2850] Many utilities have trucks and other service equipment designed to maintain poles of up to 45 feet, but no higher.[2851] Installing a 50 foot pole may require the utility to invest in new and costly service equipment.[2852] Expansion of underground conduit space entails a very complicated procedure, given the heightened safety and reliability concerns associated with such facilities.[2853] Local regulators may seek to restrict the frequency of underground excavations. We find it inadvisable to attempt to craft a specific rule that prescribes the circumstances in which, on the one hand, a utility must replace or expand an existing facility in response to a request for access and, on the other hand, it is reasonable for the utility to deny the request due to the difficulties involved in honoring the request. We interpret sections 224(f)(1) and (f)(2) to require utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access.

1164. We will not require telecommunications providers or cable operators seeking access to exhaust any possibility of leasing capacity from other providers, such as through a resale agreement, before requesting a modification to expand capacity.[2854] As indicated elsewhere in this Order, resale will play an important role in the development of competition in telecommunications. However, as we also have noted, there are benefits to facilities-based competition as well. We do not wish to discourage unduly the latter form of competition solely because the former might better suit the preferences of incumbent utilities with respect to pole attachments.

(b) Reservation of space by utility

[2849] NEES comments at 8; Cole comments at 15.

[2850] Carolina comments at 3-4; American Electric comments at 23.

[2851] NEES comments at 8-9.

[2852] UTC reply at 17.

[2853] American Electric comments at 20, 31; ConEd comments at 7; Kansas City comments at 3-4; UTC comments at 18. Some commenters assert that expanding conduit capacity is impractical. Delmarva reply at 7.

[2854] *See* PNM comments at 20; Carolina comments at 5; American Electric reply at 14.

Exhibit B

Local Competition Order on Reconsideration

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
	)	
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185
	)	
	)	
	)	

ORDER ON RECONSIDERATION

Adopted: October 20, 1999 **Released: October 26, 1999**

By the Commission: Commissioners Furchtgott-Roth and Powell concurring in part, and dissenting in part and issuing separate statements.

I. INTRODUCTION

1. In this *Order on Reconsideration*, we address petitions for reconsideration or clarification of the *Local Competition Order*[1] regarding the rules implementing access provisions of the Communications Act of 1934[2] ("the Act"), as amended by the Telecommunications Act of 1996[3] ("1996 Act"). In the *Local Competition Order*, the Commission established a program for nondiscriminatory access to utilities' poles, ducts, conduits and rights-of-way, consistent with its obligation to institute a fair, efficient and expeditious regulatory regime for determining just and reasonable pole attachment rates with

[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499, 15505 ¶ 1 (1996) (*Local Competition First Report and Order*), *aff'd in part and vacated in part sub nom.* Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom.* Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, and remanded sub nom.* AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721 (1999) (*Iowa Utilities Board*), *Order on Reconsideration*, 11 FCC Rcd. 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd. 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 12460 (1997), *appeals docketed*, *Second Further Notice of Proposed Rulemaking*, FCC 99-70 (rel. Apr.16, 1999) (*UNE Further NPRM*).

[2] Communications Act of 1934 ("Communications Act") 47 U.S.C. §§ 151, *et seq.*

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), codified at 47 U.S.C. §§ 151, *et seq.*

B. Capacity Expansions and Reservation of Space

1. Expansion of Capacity for the Benefit of Attaching parties.

a. Background

47. In the *Local Competition Order*, we recognized that a utility is able to take the steps necessary to expand capacity if its own needs required such expansion, and that the principle of nondiscrimination established by section 224(f)(1) would require it to do likewise for telecommunications carriers and cable operators.[118] However, we also recognized that the complexity of an expansion can vary given the particular circumstances of an attachment request. Accordingly, we declined to adopt a specific rule that would prescribe when a utility could reasonably deny access based on difficulties posed by the expansion. In the *Local Competition Order*, we interpreted sections 224(f)(1) and (f)(2) to require utilities to take all reasonable steps to accommodate requests for access and to explore potential accommodations in good faith with the party seeking access. In reaching these conclusions, the Commission rejected utilities' arguments that the failure of section 224 to explicitly impose this requirement indicates that utilities need not expand or alter their facilities to accommodate entities seeking to lease space.[119]

b. Positions of the Parties

48. FP&L and AEP contend the Commission exceeded its statutory authority in its decision requiring a utility to take all reasonable steps to expand capacity to accommodate requests for access just as it would expand capacity to meet its own needs. They assert the Commission's decision is contrary to the plain language of the statute.[120] They argue further that the Commission failed to recognize that section 224(f)(2) gives utilities the right to deny access based on insufficient capacity. While Congress specified that such denials must be made on a nondiscriminatory basis, it did not further qualify that section.[121] According to ConEd, that a particular expansion may be technically possible should not compel a utility to jeopardize its operations by actually performing the work.[122]

49. In response, AT&T states that there is no legal or practical basis for utilities' arguments on reconsideration. AT&T notes that although section 224(f)(2) permits electric utilities to deny access based on insufficient capacity, the Act does not define that term, and the Commission properly adopted the interpretation that is most consistent with the nondiscriminatory provisions of the statute.[123]

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[118] *Local Competition Order* at para. 1162.

[119] *Id.* at para. 1161.

[120] FP&L comments at 6-9; AEP comments at 8-11.

[121] FP&L comments at 6-9; AEP comments at 8-11.

[122] ConEd comments at 4.

[123] AT&T reply comments at 33. *See also* NCTA opposition at 26-27.

50. NCTA argues that section 224(f) creates a right of access to rights-of-way, and the absence of spare capacity on a physical facility does not necessarily mean the right-of-way is full. According to NCTA, the amount of available space in a monopoly telecommunications environment should not constrain access in a competitive environment.[124]

c. Discussion

51. We are presented with no new facts or legal arguments to support the utilities' request for reconsideration of the *Local Competition Order*'s interpretation of the utilities' obligation to expand capacity to accommodate telecommunications carriers and cable operator's requests to attach to the utilities' poles, ducts, conduits and rights-of-way. We reiterate that the principle of nondiscrimination established by section 224(f)(1) requires a utility to take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs. Furthermore, before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access. Again, because modification costs will be borne only by the parties directly benefitting from the modification, neither the utility nor its ratepayers will be harmed by the requirement that capacity expansions be undertaken on a nondiscriminatory basis.[125]

52. In the *Local Competition Order*, we recognized that a utility may deny access on a non-discriminatory basis "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." That a utility could ultimately find that it cannot grant an access request based on capacity and safety concerns does not exempt it from the overall access requirement of section 224(f). When a utility denies access, as an exception to the access requirement of section 224, it must be able to establish a prima facie case for the denial in the context of an access complaint. As we stated in the *Local Competition Order*, a utility that denies access to, for example, a 40 foot pole due to lack of capacity should be able to demonstrate why there is no capacity and enumerate the specific reasons for declining to replace the pole with a 45 foot pole.

53. It is worth noting in this regard, that utilities subject to pole attachment regulation have been expected, since the beginning of pole attachment regulation to take steps to rearrange or change out existing facilities at the expense of attaching parties in order to facilitate access. The legislative history of the 1978 law that first included direct pole attachment regulation within the Communications Act makes specific reference to the fact that "it may be necessary for the utility to replace an existing pole with a larger facility in order to accommodate the CATV user" and discusses the rate treatment to be given these "change-out" replacement costs.[126] This capacity expansion process then became a critical part of the Commission's regulatory practice and there is no indication the legislative changes adopted in 1996, designed to expand the scope of pole attachment access, reflected any intention to withdraw this existing process.

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[124] NCTA reply comments at 26-27.

[125] *See Local Competition Order* at paras. 1162-1163.

[126] S. Rep. No. 580, 95th Cong., 1st Sess. 1977.